Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

THE ALABAMA-COUSHATTA TRIBE OF TEXAS,

Petitioner,

v.

THE AMERICAN TOBACCO COMPANY; R. J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B. A. T. INDUSTRIES, PLC; PHILIP MORRIS INCORPORATED; LIGGETT GROUP, INC.; LORILLARD TOBACCO COMPANY, INC.; UNITED STATES TOBACCO COMPANY; HILL & KNOWLTON, INC.; THE COUNCIL FOR TOBACCO RESEARCH-USA, INC., Successor to the Tobacco Institute Research Committee; THE TOBACCO INSTITUTE, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does a federally-recognized Native American Indian tribe have standing to sue on its own behalf for the decimation of its discrete and narrow population?

II. Is a heightened standard being applied in determining whether Indian tribes have standing to sue on behalf of their tribal members?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 5

CONCLUSION 20

APPENDIX

A-CIRCUIT COURT OPINION (7/15/02) 1a

B-DISTRICT COURT OPINION (8/31/01) 3a

C-CIRCUIT COURT ORDER DENYING PETITION FOR REHEARING EN BANC (8/15/02) 7a

D-RELEVANT PROVISIONS INVOLVED 9a

TABLE OF AUTHORITIES

CASES

ALABAMA & COUSHATTA TRIBES OF TEXAS V. BIG SANDY INDEPENDENT SCHOOL DISTRICT, 817 F. SUPP. 1319, 1323 (E.D. TEX. 1993).....16

ALFRED L. SNAPP & SON, INC. V. PUERTO RICO EX REL. BAREZ, 458 U.S. 592 (1982).....12, 14, 17

ASSINIBOINE & SIOUX TRIBES V. MONTANA,568 F.SUPP. 269, 277 (D. MONT. 1983).....16

ASSOCIATION OF WASH. PUB. HOSP. DISTS. V. PHILIP MORRIS, 241 F.3D 702, (9TH CIR.), CERT. DENIED, 122 S. CT. 207 (2001).....9

BAKER V. CARR, 369 U.S. 186, 204 (1962) 6

CONLEY V. GIBSON, 355 U.S. 41 (1957) 19

FEDERAL POWER COMM'N V. TUSCARORA INDIAN NATION, 362 U.S. 99, 142 (1960).....18

GLADSTONE REALTORS V. VILLAGE OF BELLWOOD, 441 U.S. 91, 99-100 (1979) 6

HUNT V. WASHINGTON STATE APPLE ADVER. COMM'N, 432 U.S. 333 (1977) 11

JONES V. SMITH, 99 F.R.D. 4 (1983).....19

KAZLOWSKI V. FERRARRA, 117 F.SUPP. 650 (1954) 19

KICKAPOO TRADITIONAL TRIBE OF TEXAS V. CHACON, 46 F.SUPP.2D 644, 652 (W.D. TEX. 1999) 17

KICKAPOO TRIBE OF OKLA. V. LUJAN, 728 F.SUPP 644, 652 (10TH CIR. 1990) 15

LABORERS LOCAL 17 HEALTH AND BENEFIT FUND V. PHILIP MORRIS, INC., 191 F.3D 229 (2ND CIR. 1999), CERT. DENIED, 120 S. CT. 799 (2000) 7, 9

LEATHERMAN V. TARRANT COUNTY NARCOTICS INTELLIGENCE AND COORDINATION UNIT, 507 U.S. 163 (1993) 20

LOUISIANA V. TEXAS 176 U.S. 1, 19 (1900) 16

LUJAN V. DEFENDERS OF WILDLIFE, 504 U.S. 555 (1992) 11, 20

LUJAN V. NAT'L WILDLIFE FED'N, 497 U.S. 871, 889 (1990) 20

MATTER OF M.E.M., 635 P.2D 1313, 1316 (MONT. 1981) 14

NAACP V. ALABAMA, 357 U.S. 449 (1958) 5

NAVAJO NATION V. SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY, 47 F. SUPP.2D 1233, 1240 (E.D. WASH. 1999) 17

PIERCE V. SOCIETY OF SISTERS, 268 U.S. 510 (1925) 6

PUEBLO OF ISLETA EX REL. LUCERO V. UNIVERSAL CONTRACTORS, INC., 570 F.2D 300 (10TH CIR. 1978) 12

SERVICE EMPLOYEES INT'L UNION HEALTH AND WELFARE FUND V. PHILIP MORRIS INC., 249 F.3D 1068 (D.C. CIR.), CERT. DENIED, 122 S. CT. 463 (2001) 7

SHOSHONE-BANNOCK TRIBES v. THOMPSON, 279 F.3D 660 (2001) 10

TABLE BLUFF RESERVATION (WIYOT TRIBE) v. PHILIP MORRIS, INC. 256 F.3D 879 (9TH CIR. 2001) 4, 15

TEXAS CARPENTERS HEALTH BENEFIT FUND v. PHILIP MORRIS, INC., 199 F.3D 788 (5TH CIR. 2000) 7

TEXAS v. AMERICAN TOBACCO CO., 14 F.SUPP.2D 956 (E.D. TEX. 1997) 4

UNITED STATES v. SANTEE SIOUX TRIBE OF NEB., 254 F.3D 728 (8TH CIR. 2001) 15

VILLAGE OF ARLINGTON HEIGHTS v. METROPOLITAN HOUSING DEVELOPMENT CORP., 429 U.S. 252, 261 (1977) 6

WARTH v. SELDIN, 422 U.S. 490, 498-99 (1975) .. 6, 11, 14, 20

STATUTES

18 U.S.C. § 1961 4

25 U.S.C. § 13 9

25 U.S.C. § 1601 9

25 U.S.C. § 1602(a) 18

25 U.S.C. § 450f 9

25 U.S.C. §§ 461 2

25 U.S.C. §§ 731-737 2

U.S. Const. art. III, § 2 1

The Alabama-Coushatta Tribe of Texas respectfully petitions for a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is unreported and is reproduced here in Appendix A. The opinion and judgment of the United States District Court for the Eastern District of Texas is unreported and is reproduced here in Appendix B. The order of the court of appeals denying the motion for petition for rehearing *en banc* is unreported and is reproduced in Appendix C.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2002. A timely petition for rehearing *en banc* was denied by that court on August 15, 2002. The jurisdiction of this Court is invoked under 28 § 1254(1).

RELEVANT PROVISIONS INVOLVED

U.S. CONST. art. III, § 2 (Appendix D)

STATEMENT OF THE CASE

This case concerns the threshold standard that governs in determining whether a federally-recognized sovereign Indian tribe has standing to bring suit on its own behalf and on behalf of its members for injurious conduct that decreases its numerical strength and vitality; and, whether tribes are erroneously being held to a heightened standard. Petitioner, Alabama-Coushatta Indian Tribe of Texas ("The Tribe"), is a

federally-recognized Native American Indian tribe under 25 U.S.C. §§ 731-737. The Tribe occupies a 4600-acre reservation on U.S. Highway 190, ninety miles north of Houston and seventeen miles east of Livingston in Polk County, Texas. There are approximately 900 names on the Alabama-Coushatta tribal roll.

Although recognized as two separate tribes, the Alabamas and Coushattas have been closely associated throughout their history. The two tribes lived in adjacent areas in what is now the state of Alabama, followed similar migration routes westward after 1763, and settled in the same area of Southeast Texas. Culturally, these two tribes have always been one people. Intermarriage between the tribes has been practiced since the earliest times. In the early 1930s, the Alabama and Coushatta Indians organized under the Indian Reorganization Act as a single tribe. *See* 25 U.S.C. §§ 461 et seq.

Respondents are cigarette and tobacco product manufacturers and associated public relations and lobbying firms. The bad conduct of the tobacco industry in general, and of Respondents specifically, is well-documented and has been the subject of massive litigation in recent years. The litany of Respondents' bad acts is recounted in detail in Petitioner's Original Complaint. To summarize in the interest of brevity, Respondents, over the course of many years, have engaged in a persistent pattern and practice of deception and disinformation, resulting in the largest health care crisis in this country's history. Tobacco products are conclusively harmful, addictive, and lacking in beneficial effects and Respondents have knowingly deceived the public regarding the harmful and addictive nature of their products. Respondents have manipulated the nicotine levels in cigarettes in order to maximize profits through consumer addiction and have suppressed safer, less-addictive cigarettes.

Finally, Respondents have intentionally targeted children with their advertising campaigns to ensure new generations of addicted smokers.

Native Americans have been particularly vulnerable to Respondents' bad conduct. According to recent statistics published by the American Lung Association, among racial and ethnic groups, the prevalence of smoking is highest among American Indians. The percentage of American Indians who smoke is 40.8, compared to 24.3 percent of whites.[1]

The tobacco industry's massive marketing campaign geared to young audiences has had an especially powerful impact on Native Americans. The U.S. Surgeon General reports that, nationally, smokeless tobacco use by Native American youth on reservations is higher than that of other ethnic groups and that there is evidence of early, frequent, and heavy use of snuff and chewing tobacco by Native American children.[2] The significance of this is magnified by the fact that American Indian male and female populations, as measured by the 1990 Census, were younger than the corresponding all-race male and female populations in the United States.[3] Seventeen percent of Indian males were under age fifteen and 16 percent of Indian females were in this age group. For all races combined, this percentage was only 11 for both sexes.[4]

Tragically, life expectancy for Native Americans is considerably shorter than the general population. In 1990, only 6 percent of the Indian population was older than 64 years. For the population of all races within the United States combined, the corresponding percentage

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[1] American Lung Association Fact Sheet: *American Indians and Alaska Natives and Tobacco*, (last modified Nov. 8, 2002), http://www.lungusa.org/tobacco/native_factsheet99.html.

[2] 1994 SURGEON GEN. ANN. REP.

[3] 1990 U.S. CENSUS

[4] Id.

was 13. Overall morbidity rates are nearly twice as high for Indians as for the all-race U.S. population.[5] Because tobacco use is a risk factor for heart disease, cancer, and stroke – all leading causes of death among American Indians – the relatively high incidence of tobacco use among the Indian population is an obvious factor contributing to this life-expectancy gap.

Although accorded state-like status under the well-established doctrine of tribal sovereignty, no Indian tribes were party to the collective litigation brought against the tobacco industry by the Attorneys General of many states in the late 1990s. The Attorneys General, recognizing they lacked authority to negotiate the potential future claims of the tribes, expressly excluded Indian sovereigns from the 1998 "Master Settlement Agreement" (MSA) that resulted from that litigation. The MSA expressly states, "The Settling States do not purport to waive or release any claims on behalf of Indian Tribes." Section XII(6) of the MSA. Likewise, the State of Texas' settlement with the industry did not purport to settle on behalf of the tribes located within its borders.[6] While some of the injunctive relief agreed to in the MSA has been determined to extend geographically to tribal lands, none of the compensation for damages inured to the benefit of the tribes. *See Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc.* 256 F.3d 879 (9th Cir. 2001).

Because of their small and finite population, the Tribe has been particularly hard hit by the ravages of tobacco-related disease and death. In 2000, the Tribe filed a complaint alleging conspiracy and fraud against Respondents under the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et

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[5] Id.

[6] The State of Texas was one of four states that did not participate in the Master Settlement Agreement. *See Texas v. American Tobacco Co.*, 14 F.Supp.2d 956 (E.D. Tex. 1997).

seq., as well as claims of product liability, negligence, breach of express and implied warranties, and fraud. Respondents filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) arguing, inter alia, that the Tribe's claims were barred by remoteness. The district court agreed and, on August 30, 2001, granted Respondents' motion. The district court relied on three circuit decisions holding that trade unions' recoupment claims against tobacco companies failed to establish proximate cause. The court of appeals agreed that the trade union cases were controlling and affirmed.

REASONS FOR GRANTING THE WRIT

The ability of Indian tribes to protect their members and their organizations is paramount to the survival of Native Americans. Given the substantial importance of issues concerning Indian tribes' fair access to the courts, certiorari is warranted to establish clear and fair standards regarding tribes' standing to sue.

The Tribe seeks to establish standing, first, on its own behalf to redress injuries to the Tribal entity resulting from the bad acts of Respondents, and second, on behalf of its members to secure their rights to be compensated for their injuries and to be free from continued threats to their existence as a people.

I. THE TRIBE HAS STANDING TO SEEK REDRESS FOR INJURIES SUSTAINED BY THE TRIBAL ORGANIZATION.

This Court has long recognized that organizations are entitled to sue on their own behalf to redress injuries to themselves. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958); *Pierce v. Society of Sisters*, 268 U.S.

510 (1925). The Tribe satisfies the standards set forth in this Court's precedents regarding organizational standing.

A. The Tribe Satisfies the Test for Article III Standing Established by this Court.

When an organization seeks to establish standing to sue on its own behalf, the question is, as with other litigants, "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' [as] to warrant his invocation of federal court jurisdiction." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 261 (1977), *quoting Warth v. Seldin*, 422 U.S. 490, 498-99 (1975), and *Baker v. Carr*, 369 U.S. 186, 204 (1962). As defined by this Court, this requirement means that a plaintiff must show that he personally has suffered some actual or threatened injury as a result of the defendant's conduct and that this injury is likely to be redressed by the relief requested. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979).

The Tribe has not here predicated its right to sue on an abstract concern but, rather, has alleged concrete injuries to the tribal entity resulting from Respondents' actions and practices. Native American Indian tribes are unique sovereign bodies that suffer redressable harm when members of their discrete and narrow populations are stricken by disease and death. Further, the tribal entity has been injured in fact by the diversion of limited health-care resources to smoke-related health care problems. The Tribe has satisfied the requisite harm to establish standing to sue on its own behalf.

B. The Tribe's Claims are Distinguishable from the Trade Union Cases Relied Upon by the Court of Appeals.

The Court of Appeals relied on three cases in finding the Tribe's claims too remote to support standing: *Texas Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788 (5th Cir. 2000); *Service Employees Int'l Union Health and Welfare Fund v. Philip Morris Inc.*, 249 F.3d 1068 (D.C. Cir.), *cert. denied*, 122 S. Ct. 463 (2001); and *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2nd Cir. 1999), *cert. denied*, 120 S. Ct. 799 (2000). The common thread among these suits is that all were brought by trade or labor unions seeking to recoup the smoking-related health care costs they had expended in a third-party payor capacity. In each case, the respective courts dismissed the union funds' claims as too remote to justify direct recovery by the organization.

As Respondents in this case correctly pointed out in their briefing to the court, and as the court's opinion stated, other circuit courts have relied upon these decisions in dismissing similar third-party claims. The courts of appeal are misguided in summarily applying this trilogy of trade union cases to any organization challenging the tobacco industry in a representational posture. In the instant case, the Tribe's claims are clearly distinguishable from the trade union cases.

1. A sovereign Indian tribe differs inherently from a trade union.

The organizational foundations, purposes, and characteristics of Indian tribes and trade unions are completely dissimilar. Labor unions were formed in the last century out of economic necessity. Tribes were

formed at the dawn of time in order to protect and perpetuate the survival of these extended families. Members of a labor union are related by business economics. Union membership is by choice and individuals can join, depart, or switch to another organization at will. Members of a tribe are related by blood and culture. Tribal membership is determined by birth and individuals always remain part of a specific tribe. Further, only the working person(s) of a nuclear family may be a member of a labor union, whereas husbands, wives, children, and most relatives are members of a tribe. Most importantly, the loss of a union member through death or poor health does not threaten any fundamental right of the organization; nor, since at least theoretically there are endless potential new members, does it threaten the union's long-term existence. Conversely, an Indian tribe is a threatened, self-contained microcosm of the human race and of our society. As with a family or an endangered species, the loss of any member's life or vitality is keenly felt by the tribe and threatens the tribe's very fundamental right of existence as an indigenous people.

The economic and "infrastructure" losses alleged by the unions and rejected by the courts are simply not analogous to the crippling and fundamental losses the Tribe has suffered due to smoke-related health problems. Further, because the plaintiffs in the union cases were union trust funds rather than the union organizations themselves, the harm was far more attenuated than is the case here.

2. The Tribe is not a third-party payor.

The Indian Health Service (IHS), an agency within the Public Health Service of the Department of Health and Human Services, provides health care for some 1.5 million American Indian people. The IHS

receives yearly lump-sum appropriations from Congress and expends the funds under authority of the Snyder Act codified at 25 U.S.C. § 13 and the Indian Health Care Improvement Act, codified at 25 U.S.C. § 1601 et. seq. The IHS is mandated to contract with tribes who choose to administer programs and facilities under the Indian Self-Determination Act. 25 U.S.C. § 450f et seq. However, even in cases where tribal organizations have so contracted (as Petitioner Tribe did in 1988), the IHS retains the authority to allocate the finite funds it receives.

In their briefing to the court of appeals in this case, Respondents argue that the trade union cases definitively establish that "the rule against derivative claims applies to any kind of remote payor" and, therefore, to the Tribe. Contrarily, Respondents point out elsewhere in their brief that the Tribe "did not actually spend any money on health care for tribal members" and thus does not have standing. While Respondents appeared to want it both ways, the relevant distinguishing point is this: the Tribe is not solely seeking recoupment of third-party expenditures, as were the unions, but rather damages exacted by tobacco on the tribal entity itself through the diminution of its health, vitality and numerical strength.

Respondents correctly point out that claims which are wholly derivative of damage to individuals but couched as direct injuries to an organization have been rejected by some circuit courts. *See e.g. Association of Wash. Pub. Hosp. Dists. v. Philip Morris*, 241 F.3d 702, (9th Cir.), *cert. denied*, 122 S. Ct. 207 (2001) (finding that, since no expenditures would have been made absent injury to smokers, injury to hospital was too indirect); *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999) (holding that damage alleged to fund's financial stability was too indirect). However, there is an immeasurable difference

between mere financial expenditures and the loss of tribal members essential to the vitality and continued existence of the Tribe.

3. The Tribe as an entity is harmed by the diversion of health care resources due to smoking in a way that trade unions are not.

The courts in the union cases rejected the plaintiffs' claims of damage due to diversion of health-care resources to smoke-related illness at the expense of other health care needs. Again, the Tribe's claims in this case are distinguishable. Health care benefits offered to members of trade unions are typically provided through a trust, which is funded by withholding employee wages at an amount negotiated through collective bargaining. Fund trustees may then elect to shift payout risk to underwriting insurance companies. Because both the funds and underwriting companies engage in the business of actuarial risk-balancing, beneficiaries can expect to be covered regardless of the incident rate of either smoke-related illness or other health care needs in their group. However, because of the statutory scheme under which the IHS operates, there is a finite and often inadequate amount of money to cover the health care costs for Indian tribes. Health care resources required to address smoke-related ailments are necessarily diverted from other health care needs. As the Court of Appeals for the Ninth Circuit recognized, in *Shoshone-Bannock Tribes v. Thompson*, the problem of tribal claims exceeding amounts appropriated for them is common. 279 F.3d 660 (2001). The *Shoshone* court further acknowledged that the appropriated amounts are the total amounts available. *Id.* Once the IHS's lump sum allocations are expended on a particular health-care sector, there is no limitless well to tap and other needs must simply go

unmet. This clearly exacerbates the direct and devastating consequences of smoke-related illness to an Indian tribe.

II. THE TRIBE HAS STANDING TO BRING THIS ACTION IN A REPRESENTATIONAL CAPACITY.

A. The Tribe Satisfies the Standard of Associational Standing Established by this Court

This Court set forth a three-prong test for associational standing in *Warth v. Seldin*, *supra*, and has reaffirmed this standard in subsequent cases. *See e.g. Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977). An association has standing to bring suit on behalf of its members when: "(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit." *Warth* at 515.

The prerequisites to associational standing described in *Warth* are clearly present here. The Tribe's members would have standing to sue in their own right for smoke-related injuries, although, given the abject poverty of many Indians, it may be difficult for them to do so.[7] The interests the Tribe seeks to protect – the health and continued viability of its people – are unquestionably germane, in fact they are identical, to

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[7] For the year preceding the 1990 Census, 31.6 percent of Indians lived below poverty level in contrast to 13.1 percent for the United States All-Races population.

the Tribe's organizational purpose. Finally, neither the claims asserted by the Tribe nor the relief it requests require that individual members participate in this suit.

B. The Tribe is a Unique Sovereign Entity with a Special Interest in the Well-being of its Members

Native American Indian tribes are a unique hybrid, combining aspects of a sovereign state-like political subdivision with characteristics of an extended family unit, bound by blood and culture. The Court of Appeals for the Tenth Circuit has recognized that the peculiarly close relationship between an Indian tribe and its members, coupled with the difficulties individual members encounter in asserting their rights in courts, provide sufficient justification for permitting the tribe to sue even when it is individual Indians who are affected. *See Pueblo of Isleta ex rel. Lucero v. Universal Contractors, Inc.*, 570 F.2d 300 (10th Cir. 1978) (finding that blast disturbance of private residences on Indian lands affected tribal as well as individual rights). Further, the *Isleta* court acknowledged the strong interest the United States has in seeing that, not only tribes, but individual members have even-handed justice. *Id.* at 303. Because of the paramount role that tribes play in protecting the interests of their members, a tribe is a uniquely qualified and appropriate representative in a suit to redress injuries to those members.

C. The Tribe Meets the Standard for Parens Patriae Standing Established by this Court.

This Court established the standard for parens patriae standing in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982). In order

to maintain a parens patriae action, the state must articulate an interest apart from the interests of particular private parties, i.e. the state must be more than a nominal party. Further, the state must express a quasi-sovereign interest. The Court outlined two general categories of qualifying interests. First, a state has a quasi-sovereign interest in the health and well-being – both physical and economic – of its residents in general. Second, a state has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.

Under this standard, the Tribe is the definitive parens patriae plaintiff. Because of the unique patriarchal character of the tribal organization, there can be no better exemplar of a "parent of the country." The Tribe's pleadings in this case establish it as more than a nominal party. The Tribe has clearly articulated that its survival as an entity has been threatened, an interest well apart from the injuries to particular members. Further, the Tribe has clearly established a quasi-sovereign interest in the health and well-being of its residents in general, both of which have been harmed and threatened by the bad acts of Respondents.

III. THIS CASE CONCERNS A THRESHOLD QUESTION OF FUNDAMENTAL IMPORTANCE TO THE FUTURE OF AMERICAN INDIAN JURISPRUDENCE AND SURVIVAL.

According to the U.S. Department of the Interior, there are more than 572 federally-recognized sovereign Indian tribes in the United States and approximately 245 unrecognized tribes, most of whom are petitioning for federal recognition. The erroneous decision of the courts below will have a significant negative impact on the ability of these tribes to advocate their interests and

those of their tribal members. If the decision below is not reversed, the potential deleterious impact on these tribes would be enormous. As the Montana Supreme Court has recognized, "Preservation of Indian culture is undoubtedly threatened and thereby thwarted as the size of any tribal community dwindles. In addition to its artifacts, language and history, the members of a tribe are its culture." *In the Matter of M.E.M.*, 635 P.2d 1313, 1316 (Mont. 1981). Indian tribes must be accorded standing to protect the interests of their members lest the culture of these first Americans be "lost and . . . relegated, at best, to anthropological examination and categorization." *Id.*

A. The Court of Appeals' Decision is Inconsistent with this Court's Precedents.

As discussed above, the court of appeals' decision in this case departs significantly from this Court's precedents for representational standing established in *Warth v. Seldin*, 422 U.S. 490 (1975) and *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982). Further, as discussed below, the Court of Appeals for the Fifth Circuit is not alone in their departure from this Court's holdings.

B. The Circuit Courts are in Conflict With Respect to the Rights of Indian Tribes to Sue in a Representational Posture.

There are conflicts between the courts of appeal as to whether a tribe can sue in the posture of parens patriae under *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982). Some courts below have correctly interpreted *Snapp* to permit parens patriae standing where a significant portion of the sovereign's population is directly or indirectly

affected by the injurious conduct alleged. These courts have recognized the fluidity that the *Snapp* Court intentionally left in this standard. However, some courts of appeals have incorrectly interpreted *Snapp* to require that all tribal members be affected in order to invoke parens patriae, thereby imposing a heightened standard on tribal litigants.

Citing *Snapp*, the Ninth Circuit has correctly stated that the doctrine of parens patriae allows standing when the sovereign alleges injury to a substantial segment of its population, articulates an interest apart from the interests of the injured private parties, and expresses a quasi-sovereign interest. *Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc.* 256 F.3d 879, 885 (9th Cir. 2001). In that case, the court held that not enough members were affected to grant parens patriae status. *Id.* at 885. However, the court indicates that such status is "possible". *Id.*

The Court of Appeals for the Eighth Circuit held that the doctrine of parens patriae is "reserved for actions which are asserted on behalf of *all* of the sovereign's citizens." *United States v. Santee Sioux Tribe of Neb.*, 254 F.3d 728 (8th Cir. 2001) (emphasis in original). The court found that only a portion of the tribe was affected in that case and, for that reason, denied standing.

The Court of Appeals for the Tenth Circuit also denied a tribe standing to bring suit on behalf of its members, but indicated that a tribe could sue in parens patriae posture if the rights of all tribe members were involved. The court errroneously stated that "cases in which the parens patriae doctrine applies have been limited to those involving the rights of tribe members as a whole, and not those of just one or several members." *Kickapoo Tribe of Okla. v. Lujan*, 728 F.Supp 644, 652 (10th Cir. 1990).

The Eighth and Tenth Circuit Courts' misapplication of current Supreme Court rulings on parens patriae to tribal standing may be traced to a Montana district court ruling which first applied the wrong standard in an Indian case. In *Assiniboine & Sioux Tribes v. Montana*, the district court held that, in order to sue as parens patriae, the Sioux Tribe was required to file on behalf of every member of the tribe, since the court was "convinced . . . that the entity purporting to advance the [parens patriae] claim must be acting on behalf of the collective interests of all of its citizens." 568 F.Supp. 269, 277 (D. Mont. 1983). Although the *Assiniboine* ruling was handed down a year after this Court's decision in *Snapp*, the district court did not follow that precedent; rather, it relied primarily on dicta in *Louisiana v. Texas*, a one hundred-year-old case that stated, "the state of Louisiana presents herself in the attitude of parens patrioe [sic], trustee, guardian, or representative of all of her citizens." 176 U.S. 1, 19 (1900).

This misinterpretation has taken root and continues to proliferate at the district court level. For example, the District Court for the Eastern District of Texas in the Fifth Circuit, the same district from which this case originated, failed to properly apply this Court's precedents in a post-*Snapp* case involving Petitioner Tribe. Instead, citing *Assiniboine* and *Kickapoo*, the court denied standing because "the Tribe is not representing the interests of all its member in this case, as the doctrine of parens patriae requires." *Alabama & Coushatta Tribes of Texas v. Big Sandy Independent School District*, 817 F. Supp. 1319, 1323 (E.D. Tex. 1993). In another Fifth Circuit district court case, the court cited *Assiniboine*, *Kickapoo*, and *Big Sandy* to support its assertion that the Tribe had not "demonstrated that it had standing under the parens patriae doctrine . . . because the rights which it seeks to

assert are primarily those of a small group of Tribe members and not those of the Tribe as a whole." *Kickapoo Traditional Tribe of Texas v. Chacon*, 46 F.Supp.2d 644, 652 (W.D. Tex. 1999). And a recent opinion from a district court in the Ninth Circuit cited to *Assiniboine*, *Kickapoo*, and *Big Sandy* in holding that the Navajo tribe had no parens patriae standing because it "failed to prove it was acting on behalf of all of its members." *Navajo Nation v. Superior Court of Washington for Yakima County*, 47 F. Supp.2d 1233, 1240 (E.D. Wash. 1999).

The *Santee*, *Kickapoo*, *Big Sandy*, *Chacon*, and *Navajo* courts all cited to the *Assiniboine* court's misinterpretation of this Court's enunciation of the parens patriae doctrine. The *Snapp* Court clearly stated that the entirety was not required to invoke the parens patriae doctrine of standing. The Court expressly declined to draw any definitive limits on the proportion of the population of a sovereign that must be adversely affected by the challenged behavior in order for the sovereign to assume representational capacity. *Snapp*, *supra* at 607. The Court clearly recognized that what constitutes a sufficiently substantial segment of a sovereign's population is too dependent on the facts of each specific case to be reduced to a bright-line percentage. But the *Snapp* decision cannot be read to require that all, or even most, of a sovereign's population be directly affected in order to warrant granting parens patriae standing. Indeed, in that case, a relatively small amount of individuals were directly impacted, yet the Court held the interests of Puerto Rico were sufficiently affected to support a parens patriae action.

It is important to Indian jurisprudence that this conflict be addressed. Because of the repeated reliance on the mistake in *Assiniboine*, tribes have been incorrectly barred from litigating as parens patriae. It is

challenging enough for Native Americans to achieve redress in the courts without subjecting their tribal organizations to a heightened and virtually impossible standard of associational standing.

C. The Court of Appeals' Decision is Inconsistent with the Government's Long-Established Policy Regarding Protection of Native American Indian Rights.

Recognizing the lamentable state of Indian health care, Congress, in the statement of purpose for the Indian Health Care Improvement Act, states that "it is the policy of this Nation, in fulfillment of special responsibility and legal obligation to the American Indian people, to meet the national goal of providing the highest possible health status to Indians . . ." 25 U.S.C. § 1602(a). Further, as this Court has recognized, the essential promise by the United States to the tribes, in every treaty and statute is "we will protect you against extinction." *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960). The analysis adopted by the court of appeals below could scarcely be more at odds with these objectives. The resolution of this case will have a significant impact on the ability of tribes to advocate interests that are crucial to their survival. Imposing a heightened hurdle for standing will seriously hamper the ability of tribes to seek redress for damages to the health of their members and threats to the continued existence of Native American Indians.

D. The Court of Appeals' Dismissal of the Tribe's claims was Premature.

1. The Tribe's complaint was sufficiently pled to overcome the standard for survival of a Motion to Dismiss under Federal Rule of Procedure 12(b)(6).

Dismissal with prejudice of a party's complaint is a harsh sanction to be resorted to only in extreme cases, and is within the court's sound discretion; the court must give full regard for the severity of the sanction, granting dismissal sparingly and only when less drastic alternatives have been explored. *Jones v. Smith*, 99 F.R.D. 4 (1983). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 (1957). Courts may not dismiss a complaint for insufficiency unless it clearly appears that, by no stretch of the imagination, is the plaintiff entitled to any relief for claims asserted in his complaint. *Kazlowski v. Ferrarra*, 117 F.Supp. 650 (1954).

In challenging the Tribe's standing to sue on behalf of its members, Respondents do not contest the palpability of the alleged injuries to individuals, but rather, the sufficiency of the pleadings with respect to the causal connection between the injuries to members and the harm to the Tribe. It is important to consider the procedural posture of this case. The Tribe's complaint was dismissed for want of standing before any opportunity was afforded for submission of supporting proofs. This Court has held that, when reviewing a decision granting a motion to dismiss, the appellate court must accept as true all factual allegations in the complaint. *Leatherman v. Tarrant*

County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993). Further, this Court has stated that "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim'." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) *quoting Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990). Accepting its allegations as true, the Tribe's complaint was sufficiently pled to satisfy the threshold requirement of direct injury established by this Court's precedents. The court of appeals' premature dismissal with prejudice of the Tribe's complaint denies the Tribe the right to supply "further particularized allegations of fact deemed supportive of [their] standing." *Warth v. Seldin*, 422 U.S. at 501-02 (1975). Further, the court of appeals' premature dismissal circumvented the opportunity for development of facts and references important to current and future Indian litigants.

CONCLUSION

The Indian tribe plays an indispensable role in preserving the heritage and existence of Native Americans and in protecting the rights of its members. It is crucial that the Alabama-Coushatta Tribe be accorded standing to bring this action to ensure that it, and all other Indian tribes, may continue to adequately perform that historic role. The right of tribes to seek judicial redress on behalf of themselves and of their tribal members is a necessary corollary to Indian sovereignty. Because the basic questions presented here are of an important and recurring nature, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-41198
Summary Calendar

THE ALABAMA COUSHATTA TRIBE OF TEXAS,

Plaintiff-Appellant,

v

THE AMERICAN TOBACCO COMPNAY; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES PLC; PHILIP MORRIS INCORPORATED; LIGGETT GROUP INC.; LORILLARD TOBACCO COMPANY INC.; UNITED STATES TOBACCO COMPANY; HILL & KNOWLTON INC.; THE COUNCIL FOR TOBACCO RESEARCH USA INC.; Successor to the Tobacco Institute Research Committee; THE TOBACCO INSTITUTE INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1: 00 – CV- 596

Filed: 7/15/2002

Before DeMOSS, PARKER, and DENNIS, Circuit Judges.
PER CURIAM:*

The Alabama Coushatta Tribe of Texas ("the Tribe") appeals the dismissal of its complaint pursuant to Federal Rule of Civil Procedure 12 (b) (6). It argues that its sovereign status and the fact that the injuries were alleged to have been suffered by the Tribe itself, apart from its members, refute the district court's determination that the Tribe could not establish the requisite proximate cause because it had suffered no direct injury.

We review the district court's ruling de nova shipp v. McMahon, 234 F3d 907, 911 (5th Cir. 2000), cert. denied, 532 U.S. 1052 (2001). After fully reviewing the parties' briefs, the applicable law, and the record, we find that the Tribe's sovereign status and their "direct injury" argument do not make this case distinguishable from Our decision in Texas Carpenters Health Benefit Fund v. Philip Morris, inc., 199 F.3d 788 (5th Cir. 2000). See Service Employees International Union Health and Welfare Fund v. Philip Morris Inc., 249 F.3d 1068, 1073 (D.C. Cir.), cert. denied, 122 S. Ct. 463 (2001) (foreign government's status as a sovereign does not eliminate or adequately substitute for proximate cause requirement); Laborers Local 17 Health and Benefit Fund V. Philip Morris, Inc., 191 F.3d 229, 239 (2nd Cir. 1999), cert. denied, 120 S. Ct. 799 (2000) (labor union funds' contention that they suffered direct injury because of "infrastructure harm" did not change fact that the alleged injury was entirely derivative of the harm suffered by the plan participants as a result of using tobacco products). Therefore, we AFFIRM for essentially the same reasons stated by the district court in its August 30, 2001 order.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

THE ALABAMA COUSHATTA TRIBE OF TEXAS,

Plaintiff,

v

THE AMERICAN TOBACCO COMPNAY; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES PLC; PHILIP MORRIS INCORPORATED; LIGGETT GROUP INC.; LORILLARD TOBACCO COMPANY INC.; UNITED STATES TOBACCO COMPANY; HILL & KNOWLTON INC.; THE COUNCIL FOR TOBACCO RESEARCH USA INC.; Successor to the Tobacco Institute Research Committee; THE TOBACCO INSTITUTE INC.,

Defendants.

Filed: 8/31/01

1:00CV596(TH)
JURY

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Before the Court is Certain Defendants' Motion to Dismiss (Doc. No. 10), Certain Defendants' Memorandum in Support of Motion to Dismiss (Doc. No.

11), Defendant Liggett Group, Inc.'s Joinder in Certain Defendants Motion to Dismiss (Doc. No. 17), Plaintiff's Response to Certain Defendants' Motion to Dismiss (Doc. No. 34), Plaintiff's Memorandum in Support of Plaintiff's Response to Certain Defendants ' Motion to Dismiss (Dog. No. 35), Defendants' Reply Memorandum in Support of Certain Defendants' Motion to Dismiss (Doc. No. 46), and Defendant Ligget Group Inc.'s Joinder in the Reply Memorandum in Support of Certain Defendants Motion to Dismiss (Doc. No. 49). Having considered the papers submitted, the applicable law and the record in this case, the Court is of the opinion that Defendants' motion is moritorious and should be GRANTED.

Plaintiff, the Alabama Coushatta Tribe of Texas, is a federally recognized Indian tribe pursuant to 25 U.S.C. §§731—737. Defendants are tobacco companies1 and the lobbying and public relations agents that represent them. Fn2

Plaintiff generally alleges that Defendants' "unlawful conduct and their addictive, injurious, and unreasonably dangerous products have injured and damaged the health, welfare and property of the members of the Alabama Coushatta Tribe of Texas." (Doe. No. 1 at 1.) Plaintiff contends that as a sovereign it can recover for damage to the Tribe itself. Thus, Plaintiff seeks to recover damages for the loss of the Tribe's size and strength and for injury to its interests in the health and well-being of its people. (See Doe. No. 35 at 1.)

This Court dismissed virtually identical claims in Texas Carpenters Health Benefit Fund v. Phillip Morris, Inc., F.Supp.2d 664, 679 (E.D. Tex. 1998), aff'd, 199 F.3d 788 (5th Cir. 1998). Plaintiffs in Texas Carpenters—three union trust funds-filed suit against tobacco companies

alleging claims under federal and state antitrust laws, federal RICO, and state law. There, the plaintiffs' claims were dismissed because, as a matter of law, they could not establish proximate cause. This Court concluded that the injury could not "under any circumstances be properly considered a direct injury" because "the Funds seek to recoup medical costs expended treating Participants who suffered from tobacco-related illnesses," 21 F.Supp.2d at 670-71, and "[f]undamental principles of proximate cause dictate that plaintiffs may only recover for injuries directly suffered." Id at 669 (citing Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992)).

Similarly, Plaintiff's claims are too remote. Neither the Tribe's sovereign status nor the wording of Plaintiff's Complaint alters the fact that Plaintiff essentially seeks to recover for injuries suffered by individual members of the Tribe. For the same reasons the plaintiffs' claims in Texas Carpenters were dismissed, the Court finds that Plaintiff's alleged injury is too remote and completely derivative of the injuries suffered by individual smokers. Fn3

IT IS THEREFORE ORDERED that Certain Defendants Motion to Dismiss (Doc. No II) is, in all things GRANTED. Fn4

IT IS FURTHER ORDERED that Plaintiff's Complaint is DISMISSED in its entirety with prejudice against all Defendants. All motions not previously ruled upon are DENIED AS MOOT.

The parties shall bear their own costs and expenses.

SO ORDERED.

Signed this the 30th day of August 2001.

THAD HEARTFIELD
UNITED STATES DISTRICT JUDGE

Footnotes

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Fn1 Phllip Morris, Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp., B.A.T. Industries, P.L.C., Lorillard Tobacco Co., The Liggett Group, Inc., American Tobacco Co., and United States Tobacco Co.

Fn2 Hill & Knowlton, Inc., The Council for Tobacco Research–U.S.A., and The Tobacco Institute, Inc.

Fn3 For purposes of this order, the Court fully incorporates its reasoning and conclusion from Texas Carpenter.

Fn4 Including Defendant Liggett Group, Inc. s Joinder in Certain Defendants' Motion w Dismiss (Doc. No. 17).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-41198

THE ALABAMA COUSHATTA TRIBE OF TEXAS

Plaintiff-Appellant

v

THE AMERICAN TOBACCO COMPNAY; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES PLC; PHILIP MORRIS INCORPORATED; LIGGETT GROUP INC.; LORILLARD TOBACCO COMPANY INC.; UNITED STATES TOBACCO COMPANY; HILL & KNOWLTON INC.; THE COUNCIL FOR TOBACCO RESEARCH USA INC.; Successor to the Tobacco Institute Research Committee; THE TOBACCO INSTITUTE INC.,

Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Texas, Beaumont

ON PETITION FOR REHEARING EN BANC

Filed: 8/15/2002

Before DeMOSS, PARKER, and DENNIS, Circuit Judges.

PER CURIAM:

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the Court having requested that the court be polled on Rehearing En Banc (FED. R. App. P. and 5TH CIR.R. 35), the Petition for Rehearing En Banc is DENIED.

RELEVANT PROVISIONS INVOLVED

U.S. Constitution: Article III § 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;–between Citizens of different States;–between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Supreme Court U.S.
FILED
DEC 16 2002
OFFICE OF THE CLERK

No. 02-746

In the

Supreme Court of the United States

THE ALABAMA COUSHATTA TRIBE OF TEXAS,

Petitioner,

v.

THE AMERICAN TOBACCO COMPANY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Respondents submit that the following question more accurately reflects the fundamental legal defect in Petitioner's suit:

> Did the Court of Appeals correctly hold (in accord with eleven unanimous decisions by eight Courts of Appeals that addressed similar claims, and as to which this Court has denied five writs of certiorari) that Petitioner's suit was barred because Petitioner's alleged injury was derivative of the personal injuries of smokers, and thus too remote and indirect as a matter of law?

LIST OF PARTIES

Appellant Below:
Alabama Coushatta Tribe of Texas

Appellees Below*:
Philip Morris Incorporated
R.J. Reynolds Tobacco Company
Brown & Williamson Tobacco Corporation (including as successor by merger to The American Tobacco Company, Inc.)
Lorillard Tobacco Company
U.S. Smokeless Tobacco Company (formerly United States Tobacco Company)
The Tobacco Institute, Inc.
Hill & Knowlton, Inc.
Liggett Group Inc.

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* B.A.T Industries, p.l.c. and The Council for Tobacco Research-U.S.A., Inc., although listed as Respondents in the caption of The Petition for Writ of Certiorari, were never served in the case below and are not parties here. References herein to "Respondents" shall refer to Respondents Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company, U.S. Smokeless Tobacco Company, The Tobacco Institute, Inc., Hill & Knowlton, Inc., and Liggett Group Inc.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Philip Morris Incorporated has the following parent corporation:

Philip Morris Companies Inc.

Philip Morris Companies Inc. is the only publicly held company that owns 10% or more of Philip Morris Incorporated's stock.

Respondent R.J. Reynolds Tobacco Company has the following parent corporation:

R.J. Reynolds Tobacco Holdings, Inc.

R.J. Reynolds Tobacco Holdings, Inc. is the only publicly held company that owns 10% or more of R.J. Reynolds Tobacco Company's stock.

Respondent Brown & Williamson Tobacco Corporation (individually and as successor by merger to The American Tobacco Company) has the following parent corporations:

B.A.T Industries, p.l.c.
BATIC Inc.
BATUS Holdings Inc.
BATUS Tobacco Services, Inc.
British American Tobacco p.l.c.

British American Tobacco (1998) Ltd.
British-American Tobacco Holdings) Ltd.
Louisville Securities Ltd.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of Brown & Williamson Tobacco Corporation's stock.

Respondent Lorillard Tobacco Company, incorrectly named in the Petition as Lorillard Tobacco Company, Inc., has the following parent corporations:

Lorillard, Inc.
Loews Corporation

Lorillard Tobacco Company is a wholly owned subsidiary of Lorillard, Inc., which is a wholly owned subsidiary of Loews Corporation, which has outstanding securities in the hands of the public. Other subsidiaries of Loews Corporation that are not wholly owned by Loews Corporation but have some securities in the hands of the public are CNA Financial Corporation, Diamond Offshore Drilling, Inc., and Bulova Corporation. Loews Corporation has also issued Carolina Group stock, a publicly traded tracking stock.

Respondent U.S. Smokeless Tobacco Company (formerly United States Tobacco Company) has the following parent corporation:

UST Inc.

UST Inc. is the only publicly held company that owns 10% or more of U.S. Smokeless Tobacco Company's stock.

Respondent The Tobacco Institute, Inc. ("TI") was a not-for-profit corporation and tobacco industry association that ceased operations and was dissolved in accordance with the laws of the State of New York prior to the filing of this proceeding. At the time of its dissolution TI had no parent corporations and there were no publicly held companies that owned 10% or more of TI's stock.

Respondent Hill and Knowlton, Inc. has the following parent corporations:

WPP Group Holdings Corp.
WPP Group USA, Inc.
WPP Group USA Square, Inc.
WPP Group USA Square 2003, Inc.
WPPIH 2001, Inc.
Cygnet Holdings, Inc.
Young & Rubicam, Inc.
York Merger Corp.
WPP Luxembourg Gamma SARL
WPP Luxembourg Beta SARL
WPP Luxembourg SARL

WPP North Atlantic Limited
WPP Group plc
York Merger Square, Corp.
York Merger Square 2003 Corp.

WPP Group plc is the only publicly held company that owns 10% or more of Hill and Knowlton, Inc.'s stock.

Respondent Liggett Group Inc., incorrectly named in the Petition as Liggett Group, Inc., has the following parent corporation:

Vector Group Ltd.

Vector Group Ltd. is the only publicly held company that owns 10% or more of Liggett Group Inc.'s stock.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6 iii

TABLE OF CONTENTS vii

TABLE OF AUTHORITIES viii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. THERE IS NO CONFLICT, BUT COMPLETE HARMONY, AMONG THE COURTS OF APPEALS. 5

II. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND ANY DECISION OF THIS COURT. 8

A. This Court's Decisions Mandate The Dismissal Of Petitioner's Remote Claims. 8

B. Petitioner's Attempt To Manufacture Conflict Between The Decision Below And This Court's Decisions Is Meritless. 13

III. PETITIONER'S REMAINING ARGUMENTS IN SUPPORT OF CERTIORARI LACK MERIT. 20

CONCLUSION 21

Cases

Acoma Pueblo v. American Tobacco Co., No. CIV 99-1040 M/WWD (D. N.M. July 30, 2001), *recon. denied* (Nov. 1, 2001).....11, 17

Alabama Coushatta Tribe of Texas v. American Tobacco Co., No. 01-41198 (5th Cir. July 15, 2002) (*per curiam*), *reh. denied* (Aug. 15, 2002).....2-3, 6

Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592 (1982).....14, 16, 19

Allegheny General Hosp. v. Philip Morris, Inc., 228 F.3d 429 (3rd Cir. 2000).....5-6

Anthony v. Slaid, 52 Mass. 290 (1846) 10

Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) 10

Association of Wash. Pub. Hosp. Dists. v. Philip Morris Incorporated, 241 F.3d 696 (9th Cir.), *cert. denied*, 122 S. Ct. 207 (2001).....2, 5, 7, 17

Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960).....20

Hawaii v. Standard Oil Co., 405 U.S. 251 (1972).....16

Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992) 8-11

In re Tobacco/Government Health Care Costs Litig., 83 F. Supp. 2d 125

(D. D.C. 1999), *aff'd sub nom. Service Employees Int'l Union Health and Welfare Fund v. Philip Morris Incorporated*, 249 F.3d 1068 (D.C. Cir.), *cert. denied sub nom. Republic of Guatemala v. Tobacco Institute, Inc.*, 122 S. Ct. 463 (2001) 17-18

International Bhd. of Teamsters, Local 734 Health and Welfare Trust Fund v. Philip Morris Incorporated, 196 F.3d 818 (7th Cir. 1999) 6-7

Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc., 191 F.3d 229 (2nd Cir. 1999), *reh. and reh. en banc denied* (Aug. 6, 1999), *as amended* (Aug. 18, 1999), *cert. denied*, 528 U.S. 1080 (2000) 1-2, 6-7, 13

Lyons v. Philip Morris Incorporated, 225 F.3d 909 (8th Cir. 2000) 6

Mobile Life Ins. Co. v. Brame, 95 U.S. 754 (1877) 9

Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 17 F. Supp. 2d 1170 (D. Ore. 1998), *aff'd*, 185 F.3d 957 (9th Cir. 1999), *cert. denied*, 528 U.S. 1075 (2000) 8

Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Incorporated, 185 F.3d 957 (9th Cir. 1999), *cert. denied*, 528 U.S. 1075 (2000) 2, 7-8

Pueblo of Isleta ex rel. Lucero v Universal Constructors, Inc., 570 F.2d 300 (10th Cir. 1978) 15

Regence Blueshield v. Philp Morris Incorporated, 5 Fed. Appx. 651, 2001 WL 205996 (9th Cir. 2001) 5-7

Service Employees Int'l Union Health and Welfare Fund v. Philip Morris Incorporated, 249 F.3d 1068 (D.C. Cir.), *cert. denied sub nom. Republic of Guatemala v. Tobacco Institute, Inc.*, 122 S. Ct. 463 (2001) 2, 5, 7, 16, 18

Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912 (3d Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000) 2, 6, 12

Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) 14

Texas Carpenters Health Benefit Fund v. Philip Morris Incorporated, 199 F.3d 788 (5th Cir. 2000) 6

United Food and Commercial Workers Unions, Employers Health and Welfare Fund v. Philip Morris, Inc., 223 F.3d 1271, *reh. and suggestion for reh. en banc denied*, 239 F.3d 371 (11th Cir. 2000) 2, 7

United States v. Santee Sioux Tribe of Nebraska, 254 F.3d 728 (8th Cir. 2001) 19

United States v. Standard Oil Co., 332 U.S. 301 (1947) 9

Warth v. Seldin, 422 U.S. 490 (1975) 13, 15

Statutes And Rules

25 U.S.C. § 13 11

25 U.S.C. § 1601 11

25 U.S.C. § 1602 ..... 11, 20

25 U.S.C. § 1621f 11

25 U.S.C. § 1682 11

25 U.S.C. § 1683 11

42 U.S.C. § 2651 11

Fed. R. Civ. P. 12(b)(6) 20-21

STATEMENT OF THE CASE

This case comes at the end of a long line of cases brought by health care payors against tobacco companies to recover costs associated with the medical treatment of *other persons'* personal injuries allegedly caused by smoking. In this case, Petitioner, the Alabama Coushatta Tribe of Texas, claimed, *inter alia*, that it was "injured in its property and business . . . because . . . it has been required to incur significant costs and expenses attributable to smoking-related diseases." Compl. ¶¶ 147, 163, 175 (Ct. App. ER at 55, 58, 60).[1]

These cases have spawned twelve decisions from the Courts of Appeals, in eight different circuits. In each of those twelve decisions, the Courts of Appeals have ruled — *unanimously*, without a single dissent — that *all* claims must be dismissed as a matter of law because those claims were remote, indirect, and derivative of the personal injuries of individual smokers. The Courts of Appeals also have denied rehearing and rehearing *en banc* in each of the cases in which plaintiffs sought such rehearing, including in the decision below.[2] And this Court has denied

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[1] Citations in the form "App.__" are to the appendix to Petitioner's petition. Citations in the form "Ct. App. Appendix __" are to the Appendix to the Joint Brief of Defendants-Appellees submitted to the Fifth Circuit. Citations in the form "Ct. App. ER __" are to the Plaintiff-Appellant's Excerpts of Record submitted to the Fifth Circuit. Respondents will provide the Court with copies of the materials cited herein (or any other part of the records below) should the Court so request.

[2] *See Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999), *reh. and reh. en banc denied* (Aug. 6, 1999), *as amended* (Aug. 18, 1999), *cert. denied*,

(footnote continued...)

petitions for certiorari each of the five times it has been sought.[3]

On August 31, 2001, the district court below granted Respondents' motion to dismiss this case, *see* App. at 5a, holding that dismissal was required because "Plaintiff's alleged injury is too remote and completely derivative of the injuries suffered by individual smokers," and that "[n]either the Tribe's sovereign status nor the wording of Plaintiff's Complaint" compelled a different result. *Id.*

On July 15, 2002, the Fifth Circuit, agreeing with Respondents' suggestion that oral argument was unnecessary in this case, affirmed the district court in a *per curiam* ruling, in which it concluded:

(continued from previous page)
528 U.S. 1080 (2000) ("*Laborers Local 17*"); *United Food and Commercial Workers Unions, Employers Health and Welfare Fund v Philip Morris, Inc.*, 223 F.3d 1271, *reh. and suggestion for reh. en banc denied*, 239 F.3d 371 (11th Cir. 2000) ("*United Food and Commercial Workers*"); *Alabama Coushatta Tribe of Texas v. American Tobacco Co.*, No. 01-41198 (5th Cir. July 15, 2002) (*per curiam*) (App. at 2a), *reh. denied* (Aug. 15, 2002) (App. at 8a) ("*Alabama Coushatta*").

[3] *See Association of Wash. Pub. Hosp. Dists. v. Philip Morris Incorporated*, 241 F.3d 696 (9th Cir.), *cert. denied*, 122 S. Ct 207 (2001) ("*Ass'n of Wash. Pub. Hosp. Dists.*"); *Service Employees Int'l Union Health and Welfare Fund v. Philip Morris Incorporated*, 249 F.3d 1068 (D.C. Cir.), *cert. denied sub nom. Republic of Guatemala v. Tobacco Institute, Inc.*, 122 S. Ct. 463 (2001) ("*Service Employees*"); *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Incorporated*, 185 F.3d 957 (9th Cir. 1999), *cert. denied*, 528 U.S. 1075 (2000) ("*Oregon Laborers*"); *Laborers Local 17*, 191 F.3d 229, *cert. denied*, 528 U.S. 1080 (2000); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000) ("*Steamfitters*").

> [W]e find that the Tribe's sovereign status and their "direct injury" argument do not make this case distinguishable from Our decision in *Texas Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788 (5th Cir. 2000). *See Service Employees International Union Health and Welfare Fund v. Philip Morris Inc.*, 249 F.3d 1068, 1073 (D.C. Cir.), *cert. denied*, 122 S. Ct. 463 (2001) (foreign government's status as a sovereign does not eliminate or adequately substitute for proximate cause requirement); *Laborers Local 17 Health and Benefit Fund v. Philip Morris*, Inc., 191 F.3d 229, 239 (2nd Cir. 1999), *cert. denied*, 120 S. Ct. 799 (2000) (labor union funds' contention that they suffered direct injury because of "infrastructure harm" did not change fact that the alleged injury was entirely derivative of the harm suffered by the plan participants as a result of using tobacco products).

App. at 2a.

Petitioner sought rehearing or rehearing en banc, and on August 15, 2002, the Fifth Circuit denied that request in another *per curiam* ruling, noting that "[n]o member of the panel nor judge in regular active service of the Court [had] requested that the court be polled on Rehearing En Banc." App. at 8a.

REASONS FOR DENYING THE WRIT

The decision below is correct and does not conflict with any decisions of other Courts of Appeals or decisions of this Court. Indeed, the decisions of the

Courts of Appeals and this Court are in complete harmony in rejecting remote and derivative claims for lack of proximate cause. Petitioner's suggestion that the Court's review is otherwise appropriate is meritless. Review by this Court is not warranted on any ground.

In particular, as discussed below, eight Courts of Appeals (in twelve separate decisions, including the one below) have now unanimously ruled that claims by health care payors against tobacco companies to recover costs associated with treating personal injuries of individuals must be dismissed because the alleged injury is remote, indirect, and derivative. In the five such cases in which plaintiffs sought certiorari, this Court denied petitions that presented essentially the same question and advanced essentially the same arguments as the instant Petition.[4]

Respondents recognize that the Court is not bound by its prior denials of certiorari. However, the unanimity of federal appellate judges that may have informed this Court's denial of writs of certiorari in five previous instances is only augmented by the decision below, and strongly suggests the correctness of its holding.

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[4] *See* p. 2 n.3, *supra*, *compare* Petition *with* petitions for writs of certiorari in Nos. 99-545 (*Steamfitters*), 99-642 (*Oregon Laborers*), 99-791 (*Laborers Local 17*), 01-021 (*Ass'n of Wash. Pub. Hosp. Dists.*), and 01-338 (*Republic of Guatemala*).

I. THERE IS NO CONFLICT, BUT COMPLETE HARMONY, AMONG THE COURTS OF APPEALS.

Nowhere does Petitioner even attempt to argue that a conflict among the Courts of Appeals exists on the real question presented by this petition. Indeed, quite to the contrary, eight different Courts of Appeals have considered claims by health care payors — ranging from union funds to hospitals to Blue Cross insurers to governmental subdivisions, to foreign governments[5] — to recover costs associated with treating personal injuries allegedly caused by smoking. And all eight Courts of Appeals unanimously and correctly have held that such claims must be dismissed because the injury alleged is remote, indirect, and derivative, and the complaints therefore failed to allege an injury proximately caused by defendants' alleged wrongdoing:

- **Second Circuit**: "[T]he economic injuries alleged in plaintiffs' complaint are purely derivative of the physical injuries suffered by [smokers] and

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[5] Petitioner's claim that the other eleven cases involved only union trust funds (*see* Pet. at 7) is wrong. *E.g.*, *Service Employees* (consolidated appeal of claims brought by three foreign sovereigns—the Republics of Guatemala, Nicaragua, and Ukraine—as well as several union health and welfare trust funds); *Ass'n of Wash. Pub. Hosp. Dists.* (claim by quasi-sovereign public hospital districts); *Allegheny General Hosp. v. Philip Morris, Inc.*, 228 F.3d 429 (3rd Cir. 2000) ("*Allegheny*") (claim by not-for-profit hospitals); *Regence Blueshield v. Philip Morris Incorporated*, 5 Fed. Appx. 651, 2001 WL 205996 (9th Cir. 2001) ("*Regence Blueshield*") (claim by health care insurers).

therefore too remote as a matter of law for them to have standing to sue defendants." *Laborers Local 17*, 191 F.3d at 244.

- **Third Circuit**: Plaintiffs' claims "necessarily fail for being too remotely connected in the causal chain from any wrongdoing on defendants' part." *Steamfitters*, 171 F.3d at 928; *see also Allegheny*, 228 F.3d at 445.

- **Fifth Circuit**: "[T]he loss suffered by insurers is too remote from the manufacture and sale of cigarettes to justify direct recovery by the [plaintiffs] . . . ." *Texas Carpenters Health Benefit Fund v. Philip Morris Incorporated*, 199 F.3d 788, 789-90 (5th Cir. 2000); *see also Alabama Coushatta*, App. at 2a.

- **Seventh Circuit**: "The injury for which the plaintiffs seek compensation is remote indeed . . . ." *International Bhd. of Teamsters, Local 734 Health and Welfare Trust Fund v. Philip Morris Incorporated*, 196 F.3d 818, 825 (7th Cir. 1999) ("*Int'l Bhd. of Teamsters*").

- **Eighth Circuit**: "We agree with the . . . other circuits that have denied antitrust and RICO standing to ERISA plans who seek to recover for this type of indirect injury." *Lyons v. Philip Morris Incorporated*, 225 F.3d 909, 914 (8th Cir. 2000).

- **Ninth Circuit**: "[P]laintiffs' RICO and antitrust claims are 'too remote' from

defendants' alleged wrongdoing to allow recovery." *Oregon Laborers*, 185 F.3d at 964; *see also Ass'n of Wash. Pub. Hosp. Dists.*, 241 F.3d at 703; *Regence Blueshield*, 5 Fed. Appx. at 653-54, 2001 WL 205996, at *1-*2.

- **Eleventh Circuit**: "[A]ll of Plaintiff's claims, as a matter of law, are barred by the doctrine of proximate cause." *United Food and Commercial Workers*, 223 F.3d at 1273.

- **District of Columbia Circuit**: "[T]he funds' and the nations' claims are 'too remote, contingent, derivative, and indirect to survive.'" *Service Employees*, 249 F.3d at 1076.

In consistently enforcing the rule against remote and derivative claims against tobacco companies, the Courts of Appeals have explained that individual smokers may sue and that health care payors may sue in subrogation for specific health care costs (subject to the defenses that may be asserted against the injured smoker). *E.g.*, *Laborers Local 17*, 191 F.3d at 241; *Int'l Bhd. of Teamsters*, 196 F.3d at 822. Health care payors may not, however, sue tobacco companies for aggregate health care costs divorced from the claims of and defenses applicable to individual smokers. Otherwise, health care payors would be able to recover in circumstances where the individual smoker could not. "A third-party payor has no claim if its insured did not suffer a tort." *Int'l Bhd. of Teamsters*, 196 F.3d at 823.

> To allow plaintiffs to maintain actions that are entirely dependent upon the harm suffered by others threatens chaos

> for the judicial system, especially where others may (and have) filed their own actions and are capable of recovering a full range of damages, including the medical costs sought here.

Oregon Laborers, 185 F.3d at 969 (*quoting Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 17 F. Supp. 2d 1170, 1183 (D. Ore. 1998)).

The issue here is not difficult. As shown in the next section, the conclusion that all eight circuits have reached is compelled by a legal principle that has been the settled law of this Court and this country for over 150 years. As set forth in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268-69 (1992) ("*Holmes*"), a "plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover."

II. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND ANY DECISION OF THIS COURT.

A. This Court's Decisions Mandate The Dismissal Of Petitioner's Remote Claims.

There is no conflict between the Fifth Circuit's decision below and any decision of this Court. To the contrary, as the Courts of Appeals have recognized, dismissal of health care payor claims to recover health care costs associated with smoking follows inexorably from this Court's precedents. As this Court observed in *Holmes*, a tortious act will

often cause "ripples of harm" extending to various persons. 503 U.S. at 266 n.10. For example, an insurance company may suffer loss when an insured is injured, or an employer may incur costs when an employee is harmed. However, long-standing principles of law bar persons who suffer indirect and derivative injuries by virtue of their contractual or other legal relationships with direct victims from recovering in their own right from the tortfeasor.

The rule barring claims for remote and indirect injuries springs from that aspect of the common law doctrine of proximate cause that "demand[s]" a "direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 268. No fewer than four decisions of this Court articulate this "requirement" of direct injury — "one of [the] central elements" of proximate causation. *Id.* at 269.

Thus, in 1878, in *Mobile Life Ins. Co. v. Brame*, this Court barred a life insurer's attempt to recover directly from the murderer of its insured, reasoning: "The injury inflicted by [the defendant murderer] was upon [the insured], against his personal rights; that it happened to injure the plaintiff [insurance company] was an incidental circumstance, a remote and indirect result . . . ." 95 U.S. 754, 758-59 (1878). This Court added: "we are not cited to any case in this country or Great Britain where a different doctrine has been held." *Id.* at 759.

Thereafter, in *United States v. Standard Oil Co.*, 332 U.S. 301, 311-16 (1947), this Court held that the United States government did not have a cause of action in its own right under the common law to recover from a tortfeasor health care costs incurred by the government as a result of tortious injury to a soldier. This Court made clear that no such cause of action existed, and declined to create one.

In two subsequent decisions, this Court expressly incorporated the settled common law bar to recovery for remote injuries into the antitrust laws and RICO. *Associated General Contractors of Calif. Inc. v. California State Council of Carpenters*, 459 U.S. 519, 531-33 (1983) ("*AGC*"); *Holmes*, 503 U.S. at 268-71.

In *AGC*, this Court held that Congress intended common law principles of proximate causation, directness of injury, and certainty of damages to apply to antitrust damages litigation. *See* 459 U.S. at 532-333. *AGC* illustrates the rule barring remote and indirect claims with an example drawn from the facts of the seminal case of *Anthony v. Slaid*, 52 Mass. 290 (1846) (Shaw, C.J.). *See* 459 U.S. at 532 n.25. Anthony, who had contracted to support a town's poor, sued for his increased medical expenditures after the defendant's wife assaulted a pauper. The Massachusetts Supreme Judicial Court unanimously denied recovery. The court concluded that the *town* could not sue a tortfeasor for medical expenses resulting from an assault on a town pauper; therefore, a party that had *contracted with* the town to pay its paupers' expenses could not maintain such a suit. Notwithstanding the intentional nature of the tort, the injury to Anthony was "too remote and indirect." 52 Mass. at 291.

Thereafter, in *Holmes*, this Court held that RICO likewise adopted the common law "demand" for a "direct relation between the injury asserted and the injurious conduct alleged." 503 U.S. at 268. The Court held that the Securities Investor Protection Corporation — which stood in the shoes of customers of two different broker-dealers — was not entitled to pursue RICO claims against insiders whose stock manipulation had caused the failure of the broker-dealers, which had in turn caused the

customers' loss. While the manipulation caused cognizable harm to the broker-dealer, this Court held that "the link is *too remote* between the stock manipulation alleged and the customers' harm." *Id.* at 271 (emphasis added).

Thus, the injury Petitioner alleges — the impact to it from personal injuries suffered by smokers (*see* p. 1, *supra*) — falls squarely within a category of injuries that has been held to be remote, indirect, and derivative for over 150 years.

The fact that Petitioner, unlike the failed plaintiffs which have preceded it, doesn't even pay for the health care costs of its members (Pet. at 8-9),[6] makes Petitioner's claim even more attenuated than the remote claims already rejected by the courts. Petitioner claims it "suffer[s] redressable harm when members of their discrete and narrow populations are stricken by disease and death" (Pet. at 6), and seeks the recovery of health care costs "expended by State, Federal, and Tribal programs." *See* Compl. ¶ 1

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[6] The federal government has long operated and regulated a comprehensive health care service system to deliver health care to Native Americans. *See* 25 U.S.C. §§ 13, 1601, 1602. Members of federally-recognized Indian tribes are eligible to receive health services through the Indian Health Service ("IHS"). *Id.* at § 1602(a). Through the IHS, the federal government ultimately bears the financial burden of funding tribal health care services. Consistent with federal ownership of IHS funds, federal law provides that *only* the federal government is authorized via subrogation to recover from third-party tortfeasors sums it expends in treating or funding the treatment of individual Native Americans through the IHS. *See* 25 U.S.C. §§ 1621f, 1682, 1683; 42 U.S.C. § 2651. *See also Acoma Pueblo v. American Tobacco Co.*, No. CIV 99-1040 M/WWD (D. N.M. July 30, 2001), *recon. denied* (Nov. 1, 2001) ("*Acoma Pueblo*") (Ct. App. Appendix, Tab 1 at 8-10).

(Ct. App. ER at 3). Yet because Petitioner concedes that it does not actually pay for health care (Pet. at 8-9), Petitioner resorts to the additional and more abstract claim that Respondents' "injurious conduct . . . decrease[d] its numerical strength and vitality" (Pet. at 1), and that it has been injured "by the diversion of limited health-care resources to smoke-related health care problems." *Id.* at 6.

Petitioner's own description of its harm as flowing from "members . . . [who] are stricken by disease and death" (Pet. at 6) confesses the completely derivative nature of the alleged injury. And Petitioner's claim that it is "directly" injured by the "diversion of limited health-care resources" for smoking-related problems is akin to the type of alleged injuries that the appellate courts have rejected as even more attenuated than the payment of medical bills of other persons. For example, in *Steamfitters*, the Third Circuit concluded that the plaintiffs had failed to demonstrate direct injury even though they had "quite possibl[y] . . . cut back on their coverage of other medical problems in order to fund the costs of smoking-related illnesses." 171 F.3d at 934.[7]

Indeed, the Courts of Appeals have uniformly held that all manner of "ripple effects" allegedly caused by

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[7] While Petitioner reluctantly acknowledges these precedents (Pet. at 7, 9), it suggests that the Court should simply ignore the identical allegations in those cases and assume that those other plaintiffs had a "limitless well" (Pet. at 10) of health care resources, notwithstanding the contrary allegations by those plaintiffs. Petitioner's attempted distinction is legally untenable in a context where all complaints were rejected on the pleadings and their factual allegations were taken as true. *E.g*, *Steamfitters*, 171 3d at 918.

paying for treatment of smoking-related diseases, however characterized, do not satisfy the requirements of proximate cause:

> [W]hether plaintiffs' injuries are labeled as "infrastructure harm" or "harm to financial stability," their damages are entirely derivative of the harm suffered by plan participants as a result of using tobacco products. Without injury to the individual smokers, the Funds would not have incurred any increased costs in the form of the payment of benefits, nor would they have experienced the difficulties of cost prediction and control that constituted the crux of their infrastructure harms. Being purely contingent on harm to third parties, these injuries are indirect.

Laborers Local 17, 191 F.3d at 239.

Petitioner's alleged impact to its "numerical strength and vitality" is likewise simply a "ripple effect" even more attenuated and yet further removed from the alleged personal injuries of smokers and even other remote injuries (such as the payment of medical expenses to treat smokers).

B. Petitioner's Attempt To Manufacture Conflict Between The Decision Below And This Court's Decisions Is Meritless.

Notwithstanding that dismissal of this case was required by this Court's precedents, Petitioner argues that the decision below conflicts with "this Court's precedents for representational standing established in *Warth v. Seldin*, 422 U.S. 490 (1975) ["*Warth*"] and

Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592 (1982) ["*Snapp*"]." Pet. at 14. On both fronts, Petitioner has invented a conflict that does not exist, as *Warth* and *Snapp* are standing cases that do not even address the validity of remote and derivative claims and do not expand the boundaries of proximate cause.

Warth was not cited by either party in the district court or Court of Appeals below, and neither of the decisions below even mentions it.[8] *Warth* addressed the requirements of jurisdictional and prudential standing, which are not relevant here. The courts below correctly did not view the issue before them as one of jurisdictional or prudential standing, but ruled that the legal defect in Petitioner's remote claims was a failure of proximate cause. As discussed *supra* at pp. 5-7, every Court of Appeals to address similar suits has concluded that such remote and derivative claims do not satisfy the requirements of proximate cause.

Petitioner's further suggestion that *Warth* gives it standing to sue "on behalf of its members to secure their rights to be compensated for their injuries" (Pet. at 5) is irrelevant because the complaint does not seek relief on behalf of individual members. Nor did Petitioner argue below that it sought relief for

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[8] As a general rule, arguments not raised or addressed below are waived in the Supreme Court. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) (declining to address argument raised for first time in opening brief on merits: "[o]rdinarily, this court does not decide questions not raised or resolved in the lower court[s]"). Petitioner points to no "unusual circumstances" that justify the Court's consideration of this argument now. *Id.*

individual members. Indeed, Petitioner specifically alleged that its "injury is not a form of compensation for personal injuries suffered by smokers. It is a separate injury to the Tribe and is wholly distinct from the harms suffered by individual smokers." Compl. ¶ 148 (Ct. App. ER at 56). *See also* Compl. ¶¶ 164, 176 (Tribe's "injury . . .is a separate injury to the Tribe's property and is wholly distinct from the harms suffered by individual smokers") (Ct. App. ER at 58, 61).[9]

Even if it were relevant here, Petitioner's argument is legally flawed because associational standing is not a basis for aggregating personal injury claims, which Petitioner itself acknowledges. *See* Pet. at 11. As the *Warth* Court held:

> [W]hatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof. Thus, to obtain relief in damages, each member of Home Builders who claims injury as a result of respondents' practices must be a party to the suit, and Home Builders has no standing to claim damages on his behalf.

422 U.S. at 515.[10]

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[9] Nor do any of the other standing decisions by this Court cited by Petitioner (Pet. at 5-6) authorize derivative and remote claims.

[10] Petitioner also claims it is a "unique hybrid," and should be permitted to sue "even when it is individual Indians who are affected" (Pet. at 12), citing *Pueblo of Isleta ex rel. Lucero v. Universal Constructors, Inc.*, 570 F.2d 300 (10th Cir. 1978)

(footnote continued...)

Petitioner's claim that the decision below conflicts with this Court's decision in *Snapp* with respect to *parens patriae* standing is equally contrived. First, and most important, the decisions below were based on the conclusion that Petitioner's claims were derivative and thus too remote to meet the requirements of proximate cause. As with associational standing, *parens patriae* standing is a principle of prudential standing that does not expand the boundary of proximate cause, as specifically held by the Court of Appeals in *Service Employees* when it rejected a suit by foreign sovereigns against these Respondents. As that court held:

> [S]uch [*parens patriae*] status [does not] eliminate[] or adequately substitute[] for proximate cause. Rather, the doctrine of *parens patriae* is merely a species of prudential standing, . . . and does not create a boundless opportunity for governments to seek recovery for alleged wrongs against them or their residents.

249 F.3d at 1073; *see also Snapp*, 458 U.S. at 599-610 (*parens patriae* is doctrine of standing); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257-59 (1972) (*parens patriae* standing in State does not relieve it of

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("*Pueblo*"). But *Pueblo* addressed the court's subject matter jurisdiction, which depended there upon a finding that the Tribe had a possessory interest in the land at issue. The *Pueblo* Court did not authorize the Tribe there to assert personal injury claims for its members, and Petitioner cites no authority authorizing a Tribe or any other organization to assert personal injury claims on behalf of persons not before the court.

obligation to satisfy substantive elements of claims); *Ass'n of Wash. Pub. Hosp. Dists.*, 241 F.3d 696, 703 n.3 (fact that public hospitals were "political subdivisions of the state" and imbued with "attributes of sovereignty" did not "exempt[] them from the proximate cause requirement"); *Acoma Pueblo* ("[The Court] do[es] not see any support for the position that [the Tribes'] sovereignty should make a difference. A direct injury and proximate cause are applicable to all claims alleged, irrespective of Plaintiffs' status as sovereign governments. . . .") (Ct. App. Appendix, Tab 1 at 10). Accordingly, since *parens patriae* standing would not overcome the well-settled principles of proximate cause that required dismissal of Petitioner's suit, review by this Court is plainly not warranted on this basis.

Second, the *parens patriae* doctrine does not even apply to Petitioner's suit for the same reasons articulated by the district court in *In re Tobacco/Government Health Care Costs Litig.*, 83 F. Supp. 2d 125 (D. D.C. 1999) ("*Guatemala*").[11] The court there concluded that the Republic of Guatemala had failed to assert a cognizable quasi-sovereign interest because (among other things) the damages at issue — alleged harm to Guatemala's "business or property (its treasury)" — implicated "Guatemala's proprietary interests, not its quasi-sovereign interests." *Guatemala*, 83 F. Supp. 2d at 134. The court then added:

> Even if the Court were to find that Guatemala had asserted a cognizable

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[11] *Guatemala* was affirmed by the D.C. Circuit in *Service Employees*.

> quasi-sovereign interest, the fact that there are individual Guatemalan smokers capable of bringing suit to redress these injuries in the courts of Guatemala would prevent Guatemala from bringing suit as parens patriae. . . . After all, the theoretical underpinning of parens patriae standing is to "prevent[] . . . injury to those who cannot protect themselves." *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. at 600 . . . (quoting *Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57 . . . (1890). As previously noted, however, the individual Guatemalan smokers are entirely capable of protecting themselves. . . . There is no need to allow Guatemala to bring suit to protect their interests.

Id. (emphasis added).

Here, too, Petitioner claims it has been "injured in its property and business" (Compl. ¶¶ 147, 163, 175 (Ct. App. ER at 55, 58, 60)), which would affect its treasury, and the fact that individual smokers are capable of bringing suit "would prevent [the Tribe] from bringing suit as *parens patriae*." *Guatemala*, 83 F. Supp. 2d at 134. *Accord Service Employees*, 249 F.3d at 1076 (concluding that individual smokers "can be counted on" to bring suit against defendants).

Finally, Petitioner claims that review is warranted because decisions by *other* Courts of Appeals ostensibly conflict with this Court's holding in *Snapp*. Pet. at 14-17. Petitioner suggests that some courts have imposed a prerequisite that a Tribe represent the interests of *all* tribal members in order

to invoke *parens patriae* standing and that *Snapp* does not impose such a severe requirement. *Id.* at 17. It is in this context that Petitioner claims that supposedly it has been subjected to a "heightened and virtually impossible standard of associational standing." *Id.* at 18. For a number of reasons, this argument provides no basis for this Court's review.

First, whether or not other decisions conflict with *Snapp*, the decision below clearly does not. Indeed, the decision below did not even address whether Petitioner must assert the rights of all or some of its members in order to sue in *parens patriae*. It rejected remote claims that did not satisfy proximate cause requirements. There is nothing "heightened" about the standard of proximate cause applied in this case.

Second, even if the decisions of other courts were somehow germane here, they do not conflict with *Snapp*. While this Court in *Snapp* held that a government may sue in *parens patriae* on the basis of injuries to less than its entire population, it also made clear that the government must assert a "quasi-sovereign interest" and that "more must be alleged than injury to an identifiable group of individual residents" in order to insure that "a sufficiently substantial segment of its population" had been affected. 458 U.S. at 607. Petitioner plainly acknowledges that such a determination is "too dependent on the facts of each specific case to be reduced to a bright-line percentage." Pet. at 17. And the single Court of Appeals decision that Petitioner cites (*United States v. Santee Sioux Tribe of Nebraska*, 254 F.3d 728, 734 (8th Cir. 2001)) as conflicting with *Snapp* is just such a fact-specific determination. The district court decisions that Petitioner cites (Pet. at 15-17) not only do not create

a circuit conflict, but also fall into the same category of fact-specific applications of *Snapp*'s principles.

III. PETITIONER'S REMAINING ARGUMENTS IN SUPPORT OF CERTIORARI LACK MERIT.

Petitioner's remaining arguments in support of its petition require only brief response. First, Petitioner claims the decision below is inconsistent with the federal government's policy regarding the protection of Indian rights. Pet. at 18. Petitioner cites the Indian Health Care Improvement Act, 25 U.S.C. § 1602(a), but fails to explain how the decision below offends that statute or the federal government's policy to improve Indian health care. Petitioner similarly claims that review is warranted because the United States has promised tribes that "we will protect you against extinction" (Pet. at 18), citing *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960). Not only does the quote not appear in the cited case, but both it and the cited case have no bearing on the principles of proximate cause that governed disposition of this case. Petitioner claims that the decisions below "will have a significant negative impact on the ability of . . . tribes to advocate their interests and those of their tribal members" (Pet. at 13-14), but Petitioner fails to substantiate its rhetoric or explain why Indian Tribes should be permitted to circumvent the requirements of proximate cause.

Finally, Petitioner suggests that its Complaint was adequate to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Pet. at 19-20. Yet the Complaint is

replete with allegations demonstrating that Petitioner's alleged injury, as pled, is necessarily derivative of injuries to individual tribal members.[12] Petitioner reiterated the derivative nature of its claims in its Petition. Pet. at 6. The decision below was clearly not premature or inconsistent with the requirements of Rule 12(b)(6), under which the eleven other Courts of Appeal have rejected similar cases.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Date: December 16, 2002

RESPECTFULLY SUBMITTED,

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[12] *See, e.g.*, Compl. ¶ 1 ("This is an action in part to recover funds expended to provide medical treatment to Tribal members . . .") (Ct. App. ER at 3), ¶ 3 ("significant expenses have been incurred for the provision of necessary health care and other assistance necessary under various programs to Tribal members who suffer . . . from smoking-related injuries . . . ") (Ct. App. ER at 3); ¶ 123 ("The Tribe has suffered damages from the Defendants' illegal . . . conduct [that] include . . . costs and expenditures . . . to fund health care for smoking related illnesses and injuries . . .") (Ct. App. ER at 49).

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